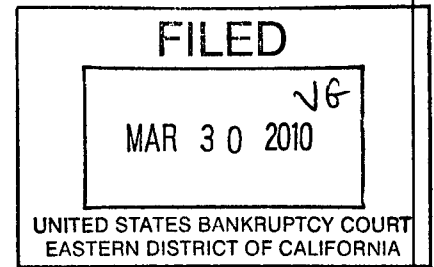


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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re

Case No. 03-15744-B-13

George R. Cleaver and  
Cindy M. Cleaver,

Debtors.

George R. Cleaver and  
Cindy M. Cleaver,

Plaintiffs,

Adversary Proc. No. 08-1123

DC No. USA-1

v.

United States of America,  
Department of Housing and  
Urban Development,

Defendant.

**MEMORANDUM DECISION REGARDING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9<sup>th</sup> Cir. BAP Rule 8013-1.

Jeffrey J. Lodge, Esq., appeared on behalf of the defendant, United States of America, Department of Housing and Urban Development.

Plaintiff, George R. Cleaver appeared *in propria persona*.

Before the court is a motion for summary judgment (the "Motion") brought by defendant United States of America, Department of Housing and Urban Development ("HUD"). HUD is a secured creditor of the debtors

1 George and Cindy Cleaver (the "Cleavers") and holds two liens against the  
2 Cleavers' home. After the Cleavers completed performance of their chapter  
3 13 plan, and the chapter 13 trustee filed his final report (the "TFR"), the  
4 Cleavers brought this adversary proceeding against HUD entitled "Complaint  
5 to Enforce Chapter 13 Plan, for Declaratory and Injunctive Relief and  
6 Damages and an Accounting."<sup>1</sup> The court held a hearing on the Motion and  
7 took the matter under submission. Because the court cannot find that there are  
8 any triable issues of material fact, and because HUD has established its right to  
9 a judgment on all claims for relief as a matter of law, the Motion will be  
10 granted.

11 This memorandum decision contains the court's findings of fact and  
12 conclusions of law required by Federal Rule of Civil Procedure 52(a), made  
13 applicable to this adversary proceeding by Federal Rule of Bankruptcy  
14 Procedure 7052. The bankruptcy court has jurisdiction over this matter  
15 pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 523<sup>2</sup> and General Orders 182  
16 and 330 of the U.S. District Court for the Eastern District of California. This  
17 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

18 ///

19 \_\_\_\_\_  
20 <sup>1</sup>This bankruptcy was filed in June 2003. The Cleavers have completed their chapter  
21 13 plan, the TFR has been filed and approved, and the Cleavers have received their chapter  
22 13 discharge. The Cleavers initially objected to the TFR on the grounds, *inter alia*, that they  
23 did not have an accurate accounting from HUD. The court overruled that objection and  
24 instructed the Cleavers to file this adversary proceeding. The TFR showed that the  
prepetition arrearage on the HUD Loan had been paid in full. HUD did not object to the  
TFR. This case appears to be ready to close once this adversary proceeding is concluded.

25 <sup>2</sup>Unless otherwise indicated, all chapter, section and rule references are to the  
26 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy  
27 Procedure, Rules 1001-9036, as enacted and promulgated *before* October 17, 2005, the  
28 effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 **Background and Findings of Fact.**

2 The court has reviewed and considered the entire record in this case, the  
3 pleadings and admissible evidence filed in support of and in opposition to the  
4 Motion, and the arguments of the parties on both sides. Based on the evidence  
5 presented, the following facts appear to be undisputed.

6 HUD was a secured creditor in the Cleavers' chapter 13 bankruptcy by  
7 virtue of a mortgage loan made to the Cleavers in 1982 (the "HUD Loan").  
8 The HUD Loan was documented and secured in two parts; a conventional loan  
9 secured by a first deed of trust against the Cleavers' residence (the  
10 "Residence") in the original amount of \$47,500, and a deferred loan secured  
11 by a second deed of trust, also against the Residence.<sup>3</sup>

12 When the Cleavers filed this bankruptcy in 2003, they had missed  
13 approximately five years of payments on the HUD Loan. The Cleavers  
14 confirmed a chapter 13 plan (the "Plan") pursuant to which they committed to  
15 pay the arrearage on the HUD Loan estimated in the Plan to be \$28,000,  
16 without interest. HUD did not object to confirmation of the Plan, specifically  
17 the portion of the Plan which provided for 0% interest on its arrearage claim.  
18 Pursuant to the Plan, the Cleavers were required to make the post-petition  
19 mortgage payments according to the terms of the loan documents directly to  
20 HUD.

21 Now that the Cleavers have completed their Plan, there is a dispute with  
22 HUD over the balance due on the HUD Loan. In July 2003, HUD filed a  
23 proof of claim in the bankruptcy case stating a "payoff amount" of \$61,659.19,

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24  
25 <sup>3</sup>The deferred loan does not become due and payable unless and until the Cleavers  
26 sell and convey title to their Residence or rent the Residence to a third party for longer than  
27 one year. The balance due on the deferred portion of the HUD Loan is not currently in  
28 dispute and is not before the court in this adversary proceeding. All references herein to the  
"HUD Loan" relate only to the conventional portion of the HUD Loan secured by the first  
trust deed.

1 including an arrearage of \$36,228.57. Interest accrued on the HUD Loan at  
2 the rate of 8.25% per annum.

3 After the Plan was confirmed, the Cleavers objected to HUD's proof of  
4 claim on the grounds, *inter alia*, that the claim included unauthorized service  
5 charges and inappropriate escrow charges, and failed to properly account for  
6 the payment history<sup>4</sup> (the "Claim Objection"). The Claim Objection included a  
7 list of payments which the Cleavers contend they made on the HUD Loan  
8 from January 1997 to May 1999. That accounting confirmed that no payments  
9 were made for 57 months between October 1998 and June 2003.

10 In response to the Claim Objection, HUD admitted that some of the  
11 statements it had provided to the Cleavers were incorrect.<sup>5</sup> In May 2004, HUD  
12 filed a response which included a history of the Cleaver's dispute with HUD  
13 and a statement of HUD's position regarding the balance due on the HUD  
14 Loan. HUD's response included copies of the loan documentation and  
15 correspondence with the Cleavers. The court held a status conference on the  
16 Claim Objection on October 13, 2004. At that hearing, the Cleavers' attorney  
17 informed the court that the parties had reached a settlement of the Claim  
18 Objection and the status conference was dropped from calendar. The parties  
19 never submitted a stipulation to memorialize their agreement, or an order to fix  
20 the balance due and resolve the dispute. However, HUD did file an amended  
21 proof of claim in November 2004.

22 HUD's amended proof of claim included a statement of account dated  
23 October 29, 2004. It showed a "total payoff amount" as of the petition date in  
24 \_\_\_\_\_

25 <sup>4</sup>The Claim Objection was filed as an objection to a proof of claim filed by First  
26 Madison Services, Inc. The proof of claim shows HUD to be the creditor and First Madison  
to be the servicing agent.

27 <sup>5</sup>See Order Setting Contested Matter For Further Status Conference filed on June 14,  
28 2004.

1 the amount of \$76,027.78. This included an unpaid principal balance of  
2 \$45,671.92 and an arrearage "total to bring current" as of the petition date in  
3 the amount of \$30,467.92 (the "Amended HUD Claim").<sup>6</sup> The Cleavers did  
4 not object to the Amended HUD Claim and proceeded to pay the stated  
5 arrearage through the Plan. The Cleavers made all of the payments due under  
6 the Plan and the arrearage portion of the HUD Loan was paid in full without  
7 interest. The Cleavers also made monthly mortgage payments directly to HUD  
8 in the average amount of \$408.15. However, HUD contends that those  
9 payments were approximately \$86 per month less than the amount required to  
10 cover the principal, interest, service charges, and the impound account for  
11 property taxes.

12 In February 2008, after the Cleavers completed their Plan payments,  
13 their bankruptcy counsel sent a demand to HUD for a beneficiary statement  
14 pursuant to Cal.Civ.Code § 2943. HUD did not respond to the demand within  
15 21 days as prescribed in § 2943(b). In April 2008, HUD filed a pleading with  
16 the court which stated that the outstanding balance due on the HUD Loan, as  
17 of April 15, 2008, was \$28,088.33 ("HUD's First Accounting"). Attached to  
18 HUD's First Accounting was a payment record showing all payments received  
19 from both the Cleavers and the chapter 13 trustee after December 14, 2004.  
20 HUD also reported that the Cleavers were current on their post-petition  
21 mortgage payments. The Cleavers objected to HUD's First Accounting. HUD  
22 reviewed its First Accounting and realized it had mistakenly applied the  
23 arrearage payments from the chapter 13 trustee to the principal portion of the  
24 HUD Loan, thus grossly understating the balance due.

25 In June 2008, HUD filed another pleading entitled "HUD's Amended  
26

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27 <sup>6</sup>The deferred portion of the HUD Loan was referenced in the Amended HUD Claim,  
28 but no amount was stated because the deferred obligation was not yet due and payable.

1 Accounting of Chapter 13 Payments” (“HUD’s Amended Accounting”).  
2 HUD’s Amended Accounting reported that the balance due on the HUD Loan,  
3 after properly crediting all payments received from the chapter 13 trustee, was  
4 \$41,639.93. In the Amended Accounting, HUD also asserted a right to collect  
5 accrued interest on the arrearage portion of its claim in the amount of  
6 \$6,872.49, and accrued attorney fees and costs in the amount of \$7,613.94.  
7 Adding these together, HUD reported a balance due as of January 1, 2008, in  
8 the total amount of \$56,126.36.<sup>7</sup>

9 The Cleavers responded to HUD’s Amended Accounting by filing this  
10 adversary proceeding for, *inter alia*, an accounting of the balance due,  
11 injunctive relief, and damages. In the intervening time between the filing of  
12 the complaint and the hearing on this Motion, the parties have engaged in the  
13 bankruptcy dispute resolution process and HUD has provided a supplemental  
14 accounting to the Cleavers. HUD has also withdrawn its demand for attorney  
15 fees and interest on the arrearage claim. After the dispute resolution process,  
16 HUD agreed to, and did, reduce the principal balance due as of January 1,  
17 2008, from \$41,639.93 to \$38,646.63. (Declaration of Mikel K. Anderson ¶6.)  
18 The record is silent as to what additional adjustments HUD made to its  
19 Amended Accounting to arrive at the lower number.<sup>8</sup> Unfortunately, the  
20 parties were unable to come to an agreement to fix the amount due on the  
21 HUD Loan going forward.<sup>9</sup>

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22  
23 <sup>7</sup>HUD’s Amended Accounting erroneously stated the total to be \$55,486.43.

24  
25 <sup>8</sup>The reasons for this reduction are not stated. It is not clear whether this was the  
26 result of further adjustments to HUD’s Amended Accounting, or a concession by HUD made  
in an effort to reach a final resolution of the dispute.

27  
28 <sup>9</sup>Subsequently the Cleaver’s bankruptcy counsel withdrew and the Cleavers are now  
proceeding *pro se*.

1 **Issues Presented.**

2 The Cleavers allege five claims for relief in the adversary proceeding;  
 3 (1) for a determination that HUD's demand for attorney fees and interest on  
 4 the mortgage arrearage paid through the Plan is inconsistent with and violates  
 5 the Plan and the order confirming the Plan; (2) for a determination that HUD is  
 6 barred by the Plan from collecting the interest and attorney fees; (3) for an  
 7 injunction barring HUD from such actions; (4) for an award of damages for  
 8 violation of Cal.Civ.Code § 2943, based on HUD's failure to timely prepare  
 9 and deliver a beneficiary statement; and (5) for a final accounting of the  
 10 balance now due on the HUD Loan. In response to the complaint, HUD  
 11 brought this Motion for Summary Judgment or Summary Adjudication. HUD  
 12 asks the court to confirm the outstanding balance due on the HUD Loan.  
 13 HUD has offered into evidence an amortization table based on its accounting  
 14 as to the declining balance due each month beginning January 1, 2008,  
 15 assuming regular mortgage payments are made. (See HUD's exhibit 7.) At  
 16 the hearing in October 2009, HUD acknowledged that the balance then due on  
 17 the HUD Loan was actually less than shown in exhibit 7 based on recent  
 18 payments.<sup>10</sup> HUD contends that there are no disputed issues of material fact as  
 19 to the accuracy of that accounting.

20 **Applicable Law.**

21 **1. Summary Judgment Standard.** Summary judgment is appropriate,  
 22 "if the pleadings, depositions, answers to interrogatories, and admissions on  
 23 file, together with the affidavits, if any, show that there is no genuine issue as  
 24 to any material fact and that the moving party is entitled to a judgment as a  
 25

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26 <sup>10</sup>The amortization table showed a balance due as of October 1, 2009, in the amount  
 27 of \$37,299.31. HUD represented that the correct balance was \$37,013.41 as of October 21,  
 28 2009.



1 matter of law. A summary judgment, interlocutory in character, may be  
2 rendered on the issue of liability alone, although there is a genuine issue as to  
3 the amount of damages.” Fed. R. Civ. P. 56(c), (made applicable in this  
4 adversary proceeding by Fed. R. Bankr. P. 7056).

5 A material fact is one that might affect the outcome of the suit under  
6 the governing law and irrelevant or unnecessary factual disputes will not be  
7 considered in a motion for summary judgment. *Anderson, et al. v. Liberty*  
8 *Lobby, Inc., et al.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

9 The moving party bears the burden of showing that there is no genuine  
10 dispute as to each issue of material fact. *Celotex Corporation v. Catrett*, 477  
11 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). However, the party adverse to a  
12 motion for summary judgment cannot simply deny the pleadings of the  
13 movant; the adverse party must designate “specific facts showing that there is  
14 a genuine issue for trial.” Fed.R.Civ.P. 56(e). More precisely, “[i]t is not  
15 enough that the nonmoving party point to disputed facts; rather, they must  
16 make a sufficient showing to establish the existence of a triable issue of  
17 material fact as to an element essential to the moving party’s case.” *In re*  
18 *Powerburst Corporation*, 154 B.R. 307, 309-310 (Bankr.E.D.Cal. 1993),  
19 citing *Lake Nacimiento Ranch v. San Luis Obispo County*, 830 F.2d 977, 979-  
20 980 (9<sup>th</sup> Cir.1987), cert. denied 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55  
21 (1988).

22 The parties may use summary judgment to dispose of all or any part  
23 thereof the opponent’s claim or cross claim. Fed.R.Civ.P. 56(a) & (b). The  
24 court may *sua sponte* grant summary judgment in favor of a nonmoving party  
25 as long as the moving party was provided a “full and fair opportunity to  
26 ventilate the issues in the motion.” *United States v. Real Property Located at*  
27 *25445 via Dona Christa, Valencia California*, 138 F.3d 403, 407, n.4 (9th Cir.  
28



1 1998), citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).  
2 The filing of a formal cross-motion is not necessary. *Local 453, International*  
3 *Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator*  
4 *Company*, 314 F.2d 25, 27 (2d Cir. 1963).

5 **Analysis.**

6 **The First Three Claims for Relief.** In their first three claims for  
7 relief, the Cleavers seek a determination: (1) that HUD's demand for attorney  
8 fees and interest on the arrearage portion of the HUD Loan is inconsistent with  
9 and violates the Plan and the order confirming the Plan; (2) that HUD should  
10 be barred by the Plan from collecting interest and attorney fees; and (3) for an  
11 injunction barring HUD from such violations and collections. At the hearing  
12 on this Motion, HUD agreed to withdraw its demand for attorney fees and  
13 accrued interest. HUD acknowledged that the arrearage portion of its claim  
14 has been paid in full through the Plan. Accordingly, the first three claims for  
15 relief appear to be moot and will be dismissed.

16 **The Fifth Claim for Relief.** In the fifth claim for relief, the Cleavers  
17 request an accounting of the balance due on the HUD Loan. In support of the  
18 Motion, HUD has produced an amortization table (exhibit 7) showing the  
19 declining balance due after the regular payments are made each month  
20 beginning January 1, 2008. The initial balance in that amortization table is  
21 less than the balance reflected in HUD's Amended Accounting filed in  
22 November 2008. HUD contends that the numbers on this document are  
23 consistent with corrections it has made to the accounting and with negotiations  
24 between the parties after commencement of this adversary proceeding. The  
25 Cleavers did not object to the admissibility of HUD's accounting. At the  
26 hearing on the Motion, HUD's counsel acknowledged that the Cleavers were  
27 current in their on-going payments and that the amount due as of October 1,  
28

1 2009, was \$37,013.41, slightly less than the amount shown for that date in the  
2 amortization table based on payments that had been made. HUD represented  
3 that the monthly payment on the conventional portion of the HUD Loan is  
4 \$396.31 and the escrow payment is \$66.74.

5 The Cleavers dispute HUD's accounting. They do not specifically  
6 contest any of the numbers in HUD's amortization table, but contend that the  
7 accounting is incomplete because it does not start from the beginning of the  
8 HUD Loan in 1982. If the Cleavers disagree with HUD's accounting, then  
9 they had the burden of producing an accounting of their own to show what  
10 they have paid and what they contend is now due. If they want a more detailed  
11 accounting from HUD, then they had a burden to produce evidence to show  
12 that HUD's numbers are wrong. They have not offered any specific  
13 information to show how or where HUD's accounting is incorrect. They have  
14 not shown that there are disputed issues of material fact that would require a  
15 trial and the production of further evidence in this adversary proceeding. In  
16 response to this Motion, the Cleavers did submit a typed, but unauthenticated  
17 list of payments that they contend was made from November 2007 through  
18 October 2009, however they do not indicate the significance of the list with  
19 regard to HUD's accounting. The Cleavers also submitted an unauthenticated  
20 letter from Jackie Tate, Escrow Administration, C&L Service Corporation,  
21 dated January 7, 2009, reflecting an overage in their escrow account, the  
22 amount of their estimated annual taxes, and their monthly escrow amount for  
23 taxes, but they do not explain the significance of the letter in the context of this  
24 Motion.

25 After listening to the parties in court on multiple occasions, and  
26 reviewing the various correspondence and declarations regarding the long and  
27 continuous history of this dispute, the court fully appreciates the depth and  
28

1 sincerity of the Cleavers' disappointment with the accounting now offered into  
2 evidence by HUD. But this dispute cries for some finality. The Cleavers  
3 continue to make their mortgage payments to HUD. Both parties need a final  
4 determination of the amounts due on the HUD Loan each month going  
5 forward. HUD has offered into evidence an amortization table that sets forth  
6 that information. The court has nothing else upon which to base its ruling.

7 **The Fourth Claim for Relief: Cal.Civ.Code § 2943.** The only  
8 remaining issue is the Cleavers' fourth claim for relief. The Cleavers request  
9 damages pursuant to Cal.Civ.Code § 2943(e)(4), which provides for a statutory  
10 penalty if a mortgage creditor "willfully" fails to produce a beneficiary  
11 statement and payoff demand within 21 days after the receipt of a written  
12 demand.<sup>11</sup> The term "willfully" is defined in § 2943(e)(4) to mean "intentional  
13 failure to comply with the requirements of this section without just cause or  
14 excuse."

15 With this Motion, HUD has offered evidence to support its contention  
16 that any failure on its part was not "willful" but was the result of difficulties  
17  
18

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19 <sup>11</sup>Cal.Civ.Code § 2943(e)(4) states: If a beneficiary for a period of 21 days after  
20 receipt of the written demand willfully fails to prepare and deliver the statement, he or she is  
21 liable to the entitled person for all damages which he or she may sustain by reason of the  
22 refusal and, whether or not actual damages are sustained, he or she shall forfeit to the  
23 entitled person the sum of three hundred dollars (\$300). Each failure to prepare and deliver  
24 the statement, occurring at a time when, pursuant to this section, the beneficiary is required  
25 to prepare and deliver the statement, creates a separate cause of action, but a judgment  
26 awarding an entitled person a forfeiture, or damages and forfeiture, for any failure to prepare  
27 and deliver a statement bars recovery of damages and forfeiture for any other failure to  
28 prepare and deliver a statement, with respect to the same obligation, in compliance with a  
demand therefor made within six months before or after the demand as to which the award  
was made. *For the purposes of this subdivision, "willfully" means an intentional failure to  
comply with the requirements of this section without just cause or excuse. (Emphasis  
added.)*

1 such as changes within the program and computer problems.<sup>12</sup> HUD's  
2 evidence, a declaration under penalty of perjury by its chief counsel, states that  
3 accounting issues with the Cleavers' payment history (no payments for the five  
4 years preceding the bankruptcy), and the fact that HUD required the assistance  
5 of their bankruptcy counsel in responding to the demand, caused the delay in  
6 HUD's ability to produce the beneficiary statement within the statutory time  
7 period. (Declaration of Mikel K. Anderson, p.3, ¶5, filed Sept. 23, 2009.)

8 That evidence supports a finding that HUD did not act "intentionally and  
9 without just cause." The Cleavers have not produced any evidence to support  
10 a finding otherwise. Accordingly, HUD is entitled to judgment on the  
11 damages issue as a matter of law.<sup>13</sup>

12 **Conclusion.**

13 Based on the foregoing, the court finds and concludes that there are no  
14 triable issues of material fact and that HUD is entitled to judgment on all  
15 claims for relief as a matter of law. HUD is entitled to a judgment fixing the  
16 balance due on the conventional portion of the HUD Loan secured by the first  
17 deed of trust, according to the accounting and amortization table provided by  
18 HUD in support of this Motion, as adjusted by HUD's counsel at the hearing.  
19 HUD is also entitled to a judgment as a matter of law on the Cleavers' fifth  
20 claim for relief for damages. HUD's failure to provide the beneficiary  
21


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22  
23 <sup>12</sup>HUD is an agency of the Federal government. HUD also contends that the federal  
24 regulations which govern HUD's operations pre-empt the states's Civil Code. The court is  
25 not deciding here whether HUD is bound by § 2943. The court is only finding that HUD did  
26 not violate § 2943 in a manner that would put that question at issue.

27 <sup>13</sup>In response to the Motion, the Cleavers also contend that they are entitled to  
28 damages for, *inter alia*, (1) the cost of having to file the bankruptcy case; and (2) lost work  
and time associated with prosecuting their dispute with HUD. Those issues are not pled in  
the adversary proceeding and are not properly before the court.

1 statement and payoff demand within 21 days was not “willful” within the  
2 meaning of Cal.Civ.Code § 2943(e)(4). The Cleavers’ first, second, and third  
3 claims for relief are moot and will be dismissed. HUD shall submit a  
4 proposed judgment consistent herewith. All parties shall bear their own  
5 attorney fees and costs for this litigation.

6 Dated: March 30, 2010

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10 W. Richard Lee  
11 United States Bankruptcy Judge  
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